pensation Act, *supra*. Petitioner was injured upon navigable waters of the United States in a factual situation in which recovery through workmen's compensation proceedings could not validly be provided by state law. Petitioner is not attempting to claim compensation under state workmen's compensation proceedings. An affirmance of the Supreme Court of Oregon will not affect the whole principle of workmen's compensation.

Petitioner is not within the "twilight zone" as that area has been defined in *Davis v. Dept. of Labor & Industries*, 317 U.S. 249, 63 S. Ct. 225, and subsequent cases. Even if the petitioner factually fell within the "twilight zone," the overlapping remedies of that zone do not encompass a damage personal injury action as contrasted with federal compensation benefits.

Petitioner has sought recovery under a state employer's liability act, substantially different from general maritime law.

ARGUMENT

1. The injury occurred upon navigable waters of the United States.

The Longshoremen & Harbor Workers' Act is only involved if the injury occurs "upon the navigable waters of the United States." Petitioner has not directly argued that his injury did not occur "upon navigable waters of the United States," but, on the other hand, he has devoted two pages of his brief (pp. 4-6) to statements of fact, the purpose of which must be to convey the general impression "maybe the body of water technically

is navigable waters of the United States, but it shouldn't be." The brief of the Amicus Curiae may dispute the fact that the injury occurred upon navigable waters of the United States (pp. 4-5). It did occur upon navigable waters of the United States.

Each fact stated by the petitioner or the Oregon State Industrial Accident Commission as casting doubt on the fact that the injury occurred upon navigable waters of the United States has been judicially or legislatively rejected as irrelevant. Ownership of the land under the water; *Luscher v. Reynolds,* 153 Ore. 625, 56 P.2d 1158; *U. S. v. Chicago M. S. T. P. E. R. Co.,* 312 U.S. 592, 313 U.S. 543, 596, 61 S. Ct. 772, 775; dredging out existing body of water or creating new body of water, Secs. 780.010 and 780.030, Oregon Revised Statutes; riparian owner charging for moorage, 53 A.L.R. 1199; harbor lines, 33 USCA 404; *Port of Portland v. Reeder,* 203 Ore. 369, 380 P.2d 324; see *The David Ball,* 10 Wall 557.

The Supreme Court of Oregon stated:

> "It is contended first, on the part of the plaintiff, that the injury did not occur upon navigable waters of the United States, but as to this we think there can be little doubt." (R. 106)

2. An affirmance will not affect the humanitarian principle of workmen's compensation.

Petitioner's principle appeal is that the Supreme Court of Oregon should be reversed because, "if respondent here successfully escapes the consequences; * * * workmen under all such Acts (compensation Acts) and

the entire concept of workmen's compensation will suffer." (Pet. Br. p. 23).

"In order to effectively enforce workmen's compensation laws and require compliance in elective states, sanctions are necessary against potential rejecting employers." (Pet. Br. p. 10).

Somehow the petitioner is contending that requiring the petitioner to accept compensation under the Longshoremen & Harbor Workers' Compensation Act is a blow to the principle of workmen's compensation.

A brief explanation of the workmen's compensation law of the State of Oregon is sufficient to show the error and misleading nature of petitioner's appeal.

Oregon's workmen's compensation law is unique. It is not an ordinary "elective" workmen's compensation state:

> "The State Industrial Accident Commission of Oregon is the only entity authorized by law to provide workmen's compensation insurance, as such, in Oregon." (Br. of Amicus Curiae, p. 1) (Sec. 656.504, Oregon Revised Statutes).

If an Oregon employer engaged in a "hazardous occupation" does not file a notice electing not to be subject to the workmen's compensation law, such employer must contribute to the state industrial accident fund. Admittedly, the law encourages electing to be subjected to the workmen's compensation law. Electing to the contrary subjects the employer to damage actions by his employees and takes away the common law defenses (Sec. 656.024, Oregon Revised Statutes).

Contrary to the insinuation of petitioner, however, employers electing not to be subjected to the workmen's compensation law are not electing not to provide workmen's compensation benefits for their employees. They are electing not to provide such benefits through the state industrial accident fund. They are providing such benefits and securing the same by private insurance coverage, as respondent did here, or, in the instance of a few large employers, as self-insurers. Compensation benefits are payable under such policies or such self-insurance programs pursuant to the schedule contained in the Workmen's Compensation Act. There is no Oregon statute requiring employers electing not to contribute to the state industrial accident fund to provide workmen's compensation benefits or secure the payment of same. Certain obvious forces and the long acceptance of the workmen's compensation principle have compelled this condition.

Petitioner, in his reply to respondent's brief in opposition to petition for writ of certiorari (p. 2) expresses ignorance of the above facts.

The brief of Amicus Curiae, the State Industrial Accident Commission, states: "Respondent's insurance policies are a closely guarded secret * * *." (Br. p. 3).

The above facts were thought to be well known facts in the State of Oregon. A standard workmen's compensation and employers' liability policy form is printed in full in Appendix B hereto.

The form of policy in effect in 1932 was partially quoted in *Anderson v. Hartford Accident Insurance Co.*,

152 Ore. 505, 53 P.2d 710, 54 P.2d 1212. The court stated, starting at page 505:

> "At that time neither he (the employee) nor the Hudson Company (the employer) was subject to the Oregon Workmen's Compensation Act. However, there was then in force covering the Hudson Company a standard workmen's compensation and employers' liability policy of insurance which prior to the date of the accident had been issued to the Hudson Company by the defendant."

The policy provided, among other things, as follows:

> "This is a contract between the company and this employer for the benefit of any employee covered by this policy who receives an injury for which he would be entitled to compensation under the provisions of such law if this employer were subject thereto. It is the purpose hereof to provide voluntarily such compensation to such injured employee who will accept it in lieu of all other claims or demands because of such injury."

The workmen's compensation law of Oregon recognizes that there are such policies. Sec. 656.326(2) states:

> "If a joint employer not subject to ORS 656.002 to 656.590 secured a policy of insurance for the payment of benefits or compensation to a workmen, in case of injury in the course of his employment, * * *."

The "Chairman's Report of the Interim Committee on the Study of the Workmen's Compensation Law in Oregon, 1940" states at page 24:

> "Under the Oregon law employers may either accept protection under the state fund, take out insurance with an acceptable private carrier or act as self-insurers. * * *
>
> "There can be no doubt that the absence of the exclusive feature from the Oregon law greatly

complicates many problems. For example, changes in rates have to be made with great care due to the danger that some of the most careful and efficient employers insofar as safety work is concerned may withdraw and take coverage under private companies. Increasing benefit scales for claimants (raising cost to employers, of course) becomes more different to put into effect. A vicious cycle is set up as a result of which the abler employers tend to leave and the state fund has to carry the poor risk."

According to the "Forty-ninth Annual Report of the Insurance Commissioner for the State of Oregon" for the year 1956, private insurance companies received from Oregon for policies denominated "Employers' Liability and Voluntary Compensation" premiums for the year 1956 of $2,310.561.

There simply is no basis for petitioner's assertions that an affirmance here would cause the entire concept of workmen's compensation to suffer.

3. The "twilight zone" cannot be expanded to include cases of this type.

The Longshoremen & Harbor Workers' Compensation Act (33 USCA, Secs. 901-950) was passed in 1927. It was patterned after the New York State Compensation Act (*Robinson on Admiralty*, p. 109). It provides compensation for temporary and total disability, medical and hospital care and compensation for death. Fault as a cause of injury or death is immaterial. No federal fund is created to pay compensation or benefits. Employers must either secure insurance covering their obligations under the Act and furnish

proof of having such insurance, or qualify as a self-insurer. It was stipulated that the respondent had secured insurance covering his obligations under the Act (R. 55). There can be no rejection of the Act by the employer or employee. Acceptance of the Act is mandatory. If an employer fails to secure insurance or to qualify as a self-insured employer, the injured employee may still claim compensation and, in addition, the employer is subject to fine and imprisonment. Payment of benefits and compensation is automatic without any administrative award or order, i.e., in the event of injury, the deputy commissioner who administers the Act is given a report by the employer or insurance carrier and the employer or insurance carrier then makes payments directly to the injured employee. The deputy commissioner is not called upon to make any ruling unless the obligation to pay compensation or the amount of compensation is controverted by the employer or employee. Thus, in the instant case, in which the petitioner has not as yet claimed compensation under the Act, the deputy commissioner cannot make a ruling. The amount of compensation payable under the Act is generally comparable to the amount payable under the Oregon Workmen's Compensation Act, with compensation under the federal Act probably being slightly larger for most injuries.

The Act was the result of a long line of judicial decisions well known and frenquently recited by this Court.

The basis of federal power was primarily Article III, Section 2, of the United States Constitution which provides:

> "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

This section was supplemented by such sections as Article I, Section 8:

> "The Congress shall have the power * * *
> "3. To regulate commerce with foreign nations and among the several states * * *."

This Court has always regarded these sections and the "all laws that shall be necessary and proper" section as being a grant of legislative power as well as a grant of judicial jurisdiction. See *The Thomas Barlum*, 293 U.S. 21, 55 S. Ct. 31.

A substantial number of matters of admiralty and maritime jurisdiction arise within state boundaries and are litigated in other than admiralty courts. This was a potential source of clash between federal legislative and judicial authority and state legislative and judicial authority. Conflict along this line was light and the border had not been judicially surveyed by 1917, the year of *Southern Pacific v. Jensen*, 244 U.S. 205, 37 S. Ct. 524. This case set the direction for the complete course in this area. The impact of the decision has frequently been blunted, but its underlying premise is reiterated by this Court almost every term. In *Southern Pacific v. Jensen*, Justice Holmes, in his dissent, p. 532, stated:

> "But hereto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman vs. New York*, 179 U.S. 552, 45 L. Ed. 314, 21 St. Ct. Rep. 212, the state law, common or statute, would prevail in the courts of the state."

In complete opposition, the majority stated, on p. 528:

> "And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and martime jurisdiction."

This language of the majority is repeatedly paraphrased in opinions of this Court. For example, in the majority opinion in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 205, it is stated.

> "Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under a national power to control 'its substantive as well as its procedural features * * * ' (case cited). Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court."

The basis and continuing premise of *Jensen* is that, as to things maritime, such as injuries on navigable waters, admiralty case law and federal legislative law

are supreme over state common law and state statute law.

This Court in *Davis v. Dept. of Labor & Industries*, 317 U.S. 249, 87 L. Ed. 246, 63 S. Ct. 225, stated:

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by the federal Act." (Page 227)

The majority clearly accepted the basic principle of *Jensen*.

The thread that respondent finds in *Davis* and the decisions of this Court subsequent to *Davis* is as follows: If the only fact invoking maritime or admiralty jurisdiction is that the injury occurred on navigable waters, the injured employee is in the twilight zone and has his choice of remedies of state compensation benefits or federal compensation benefits; this legal principle, replacing a demarcation line with a demarcation zone, while not capable of logical explanations, is capable of justification on the grounds that it provides workmen's compensation benefits to employees who were intended to have such benefits without the necessity of protracted litigation or meticulous legal prognostication.

In *Moore's Case*, 323 Mass. 462, 80 N.E.2d 478, 335 U.S. 874, 69 S. Ct. 233, the Massachusetts Court pointed out that the injured rigger's employment normally was not concerned with the water or federal and maritime matters, rather he did a major portion of his work on land. In *Baskin v. Industrial Accident Commission*, 338 U.S. 854, 70 S. Ct. 99 (89 Cal. App. 2d 632), 201 P.2d 549; 340 U.S. 886, 71 S. Ct. 208 (97 Cal. App.

2d 257), 217 P.2d 733, the injured materialman was specifically instructed not to go on ships at any time and he actually did only on two or three "tours of short duration."

This Court apparently is of the opinion that, if the only tie with admiralty and maritime law is that the accident occurred on navigable waters of the United States, the federal supremacy in admiralty and maritime law and the uniformity required therein will not be threatened by permitting an injured workman to receive compensation benefits according to the workmen's compensation laws of the state where he was injured. And further, despite the illogic of the result, a "twilight zone" is necessary in a certain area in order to provide a certain compensation remedy for injured workmen.

If this be a correct analysis, it is respectfully submitted that the "twilight zone" cannot be expanded to any great size because its existence is completely contrary to this Court's decisions in other fields of admiralty and maritime law.

In the field of personal injuries, this Court has repeatedly held, even if the only possible connection with the admiralty and maritime law is the place of injury, i.e., navigable waters of the United States, that connection is sufficient to make it "a type of action which the Constitution has placed under national power to control its substantive as well as its procedural features * * *," *Pope & Talbot v. Hawn, supra,* at page 409.

In *Garrett v. Moore-McCormack Co.,* 317 U.S. 239,

63 S. Ct. 246, the connection with maritime and admiralty was clear enough, the plaintiff being a seaman injured on board his vessel. The inapplicability of state law, however, was not as clear. The plaintiff brought his Jones Act case in the state court. The question was whether state law or admiralty law would govern the answer to the question of which party has the burden of proving the validity of a release. This Court stated:

> "Much of what we have said above concerning the necessity of preserving all of the substantial admiralty rights in an action as law in incompatible with the conclusion of the Court below. The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere ir dent of a form of procedure."

In *Pope & Talbot, Inc. v. Hawn, supra,* plaintiff was a carpenter who went on board the ship to make minor repairs on grant loading equipment. He brought an action against Pope & Talbot on the law side of the federal District Court. The question was whether or not contributory negligence was a complete bar, as it would be if state law was applicable, or whether contributory negligence was only to be considered in mitigation. A majority of the court held that state law could not apply as he was injured on navigable waters. Among other things, the court said:

> "Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling." (p. 409)

During the last term of this Court, this problem of

federal versus state law was again before the Court in *McAllister v. Magnolia Petroleum Company,* U.S. , 78 S. Ct. 1201:

> "The question in this case is whether a state court may apply its two-year statute of limitations to bar an unseaworthiness action that is joined with an action for negligence under the Jones Act."

The majority held that the state statute of limitations could not be applied, even though there was no federal statute because, if it were, "the result falls short of affording the seaman 'the full benefit of federal law' (case cited) to which they are entitled when state courts undertake to adjudicate claims under the federal maritime law."

This Court has been repeatedly holding that, in personal injury damage actions, either in the state court or on the civil side of the federal court, if the injury occurred upon navigable waters, state law could not be applied. The twilight zone cannot be expanded if the law in the instant type of case is to bear any semblance of consistency with the above-stated cases, and some consistency appears essential.

Aside from theoretical consistency, expansion of the twilight zone to the instant type of case would create additional vexatious judicial problems. If the Oregon workmen's compensation law could validly apply so as to enable petitioner to maintain a damage action against respondent, the whole Act ought to be applied to maritime injuries. Under the above cited cases, this does not seem possible, but how can one part of the Act, and a

very substantial part, permitting actions against privately insuring employers be applied and not others?

For example, a hypothetical case—a general contractor and a sub-contractor were making voyage repairs to a vessl lying in the Columbia River unloading her cargo and an employee of the sub-contractor, while on the vessel, was injured through the fault of the general contractor. The injured employee brought an action against the general contractor in an Oregon state court, or, on diversity jurisdiction, on the civil side of the federal District Court. The general contractor alleged as a defense that both it and the sub-contractor, the plaintiff's employer, were insured by the Oregon state industrial accident fund, both had joint supervision and control over the premises where the plaintiff was injured and, therefore, the plaintiff's action is barred. Under the Oregon Compensation Act, this is a perfectly valid and maintainable defense. Section 656.154 of the Oregon Revised Statutes states:

> "1. If the injury to a workman is due to the negligence or wrong of a third person not in the same employ, the injured workman, or if death results from the injury, his widow, child or other dependants, as the case may be, may elect to seek a remedy against such third person. However, no action shall be brought against any such third person if he or his workman causing the injury was, at the time of the injury, on premises over which he had joint supervision and control with the employer of the injured workman and was an employer subject to ORS 656.002 to 656.590."

Yet how can such a defense be maintained. Under the decision of *Pope & Talbot v. Hawn, supra,* it could

not. How can the Oregon compensation law as in the above-quoted section be applied as a bar? Yet, if the above-quoted section cannot be applied because the injury occurred upon navigable waters, how can other parts of the Act be applied? What determines which can validly apply and which cannot? Certainly, in Oregon, an expansion of the twilight zone to include this case would lead to a myriad of employee-employer litigation.

4. The facts of this accident do not place it within the "twilight zone."

In determining what falls on the exclusively federal side of the twilight zone, there appear to be two primary qualifications: (1) Did the injury occur upon navigable waters of the United States (this, of course, is a "must" in all cases)? (2) Were the general duties of the injured employee directly connected with water commerce and navigation, i.e., maritime employment, or was the work that the employee was doing *at the time of the accident* directly connected with commerce and navigation, i.e., maritime employment?

This Court, prior to *Davis v. Dept. of Labor & Industries,* considered whether or not the employees work, either generally or at the time of the injury, directly involved commerce and navigation, a definite criterion to determine whether state or federal law was applicable. For example, in *Sultan Ry. & Timber Co. v. Dept. of Labor & Industries of State of Washington,* 277 U.S. 135, 48 S. Ct. 505, 506, employees booming rafts for shipment and others breaking up

booms and guiding the logs into the mill were involved. The court observed:

> "In both instances, the place of work is on navigable water—in one it is done before actual transportation begins and in the other after the transportation is completed.
>
> "It is settled by our decisions that, where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

The court in *Parker v. Motor Boat Sales,* 314 U.S. 244, 62 S. Ct. 221, 223, stated:

> "The Circuit Court (116 F.2d 789, 793) was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen & Harbor Workers' Act would not apply because his employment was 'so local in character' that Virginia could validly have included it under its State Workmen's Compensation Act. This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance and other and different duties on land cannot alter the fact that, at the time of the accident, he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made"

The facts here are that the respondent certainly was an employer, some of whose employees are employed in maritime employment, in whole or in part, upon navigable waters of he United States (33 USCA 902(4)).

Respondent operated three tugs and ten barges on the Willamette and Columbia Rivers (R. 64, 65). The petitioner's general duties were exclusively on water. The petitioner stated:

> "My duties was to remove this barge—this barge that they was loading with this raw material, back and forth so they could spread it even." (R. page 26)

Plaintiff moved the barge by fastening a cable from a winch on another barge to be moved and then winching the barge to various positions (R. 30-32). He was transported to and from his work on the barge by a boat (R. 52).

At the time of his injuries, plaintiff was doing work directly with water commerce or navigation—maritime employment. He was injured while attempting to unloosen a cable by which cargo, a hopper in this case, had been moved from one barge to another. The wooden hopper was cargo moving in interstate water commerce, just as grain, petroleum products, paper products, etc., are cargo moving on Pacific Northwest waters. The hopper was loaded onto the barge on the Sandy River, an Oregon river which is a tributary of the Columbia, transported by water down the Columbia where the Columbia runs between Oregon and Washington, and then up the Willamette River, a river entirely in Oregon, to the place of the injury where it was loaded onto another barge. As had been contemplated, soon after the plaintiff's injuries, the barge with the hopper on it was transported by water down the Willamette to the Columbia and then down the Columbia to Cath-

lamet, Washington (R. 62). The plaintiff's job was "to help them load this gravel bin onto the barge (R. 36).

Petitioner "help(ed) to get the hopper set down on the barge * * * you (petitioner) had to turn it and set it down righ[t] * * * then you (petitioner) had to get the cable that was being used that was attached to the derrick loosened up so that you could get it" (R. 39). The hopper was moved by means of a derrick which had a cable hooked onto the hopper and after the hopper was stowed properly on the barge, plaintiff was going to unloosen the cable (R. 39).

The work that the plaintiff was doing at the time of his injury was exactly the same work that is done every day on the waterfront by longshoremen. Water cargo is generally loaded or unloaded by being lowered or raised by shore or vessel cranes, winches and so forth, with cables or slings attached to the cargo. These cables or slings are attached by longshoremen, sailors or harbor workers generally. The classification of employees doing the work is often determined by a collective bargaining agreement between a labor union and the employer. Obviously, there is the same direct relation to water commerce or navigation whether the cargo be a hopper bound for Cathlamet, Washington, or wheat bound for Pusan, Korea.

The Supreme Court of Oregon has already made a factual determination that the loading of a vessel is completely maritime. This was prior to the *Davis* case, but the factual determination has not changed. In *Martinson v. State Industrial Accident Commission*, 154

Ore. 423, 60 P.2d 972 (1936), the Oregon Supreme Court stated at page 426:

> "The loading of a barge or a ship has direct relation to commerce and navigation, is not a matter of purely local concern, and uniform laws in respect thereto are essential. So far as concerns the nature of the work to be performed, the loading of a vessel has as direct relation to commerce and navigation as the unloading."

The court held that the plaintiff could not recover compensation from the Oregon State Industrial Accident Commission.

In *Chappell v. C. D. Johnson Lumber Corp.*, 112 Fed. Supp. 625, 626 (Dist. Ct. Ore. 1953), District Judge Solomon stated:

> "In my opinion, the loading of a barge of 18 tons or more in navigable water is maritime in nature and injuries of a workman employed on such a barge are likewise maritime and the rights and liabilities of the parties in connection therewith are clearly within the admiralty jurisdiction and outside the reach of state compensation laws."

The Court of Appeals for the Ninth Circuit, in the same case, 216 F.2d 873, 874 (1954), stated:

> "The facts as submitted disclose a typical situation of maritime injury (citation). Accordingly, we accept the trial court's ruling that the case is not ruled by *Davis*, supra."

This Court, in *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 St. Ct. 302, at 304, stated by way of dictum that the injury was not covered by the twilight zone. There, of course, the question was whether the Federal Employers' Liability Act or the Longshoremen

& Harbor Workers' Compensation Act would apply. Petitioner was a freight brakeman who made up trains in a yard at Jersey City. He was injured while working on a car float. The court stated.

> "The 'Jensen line of demarcation between state and federal jurisdiction has been accepted.' *Davis vs. Dept. of Labor* (citation). *New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water.* (emphasis supplied.)

This case must fall on the exclusive federal side of the twilight zone—it happened on navigable waters; the respondent employer was substantially engaged in maritime work; the petitioner worked exclusively on navigable waters of the United States; his work at the time of injury was in the course of water commerce and navigation.

If this factual situation is held to place this case in the twilight zone, it is impossible to conceive of any factual situations which would not be within the twilight zone. The Longshoremen & Harbor Workers' Act would encourage rather than discourage litigation. There would seem to be no good reason why every employee injured on navigable waters, whose employer was subject to suit, would not try litigation. The employee really would have nothing to lose; if he lost the litigation, he would later take his benefits under the Longshoremen & Harbor Workers' Act.

5. The "twilight zone" does not apply to a choice between a damage action and a federal compensation proceedings, but only to a choice between federal and state compensation proceedings.

The *Davis* case and its successors are only authorities supporting a choice of remedies, federal and state, both of which are based upon the theory of compensation without fault, as opposed to a damage action based upon fault.

It is clear that the United States Congress enacted the Longshoremen & Harbor Workers' Act so as to give workmen covered by the Act the benefit of the compensation principle and not require them to rely on the principles of negligence, as the seamen desired to do. In *Davis v. Dept. of Labor & Industries, supra*, at page 254, it was stated:

> " * * * The purpose of the federal Act, which seeks to give 'to those hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation', and the state Act such as the one before us which aims at 'sure and certain relief for workmen.'" (Citing for this statement, Report of the Senate Committee on Judiciary on the Longshoremen & Harbor Workers' Compensation Act.).

Mr. Underhill, representative from Massachusetts and proponent of the bill, spoke on its behalf in the House at the time of its passage, as follows:

> "It (the bill) eliminates to a large extent the delay, suffering, hardship and expense incident to the long time in which it took to reach a case after it was submitted to the court because of the congestion in the courts, with damage cases crowding the docket." 68 Congressional Record, Page 5412.

Various members of this Court have on various occasions expressed their unfavorable opinion of basing recovery in employee cases upon fault. In *Rogers v. Missouri-Pacific R. R. Co.*, 352 U.S. 518, 77 St. Ct. 459, it is stated:

> "'One's deep sympathy, is of course, aroused by a victim of the hazards of negligence litigation in situations like the one before us. But the remedy for a obsolete and uncivilized system of compensation for loss of life or limb of crews on ships and trains is not intermittent disregard of the considerations which lead Congress to intrust this court with the discretions of certiorari jurisdiction. The remedy is an adequate and effective system of workmen's compensation', adequate in amount and especially prompt in administration. * * *. Finally, one cannot acquit the encouragement given by this Court for seeking a success in the lottery of obtaining heavy verdicts of contributing to the continuance of this system of compensation whose essential justice can hardly be alleviated by the occasional 'correction' in this Court of ill success."

In *Bailey v Central Vermont Ry., Inc.*, 319 U.S. 350, 63 S. Ct. 1062, the majority stated:

> "That method (liability by fault) of determining the liability of carriers and of placing on them the cost of these industrial accidents may be crude, archaic and expensive as compared with the more modern systems of workmen's compensation. But, however inefficient and backward it may be, it is the system which Congress has provided."

In this situation, Congress did provide a workmen's compensation system.

Congress, in drafting the Longshoremen & Harbor Workers' Compensation Act, limited it to "if recovery

for the disability or death through *workmen's compensation proceedings* (emphasis supplied) may not validly be provided by the state law." Congress did not say the federal Compensation Act should not apply if recovery for the injured could be obtained by state law, by damage action based upon state law, or use any other similar language. Congress used the words "workmen's compensation proceedings."

Samuel B. Horowitz, editor of N.A.C.C.A. Journal, writing in 1944 on "Injury and Death under Workmen's Compensation Laws" stated on pages 31-32:

> "In short, the twilight zone doctrine (allowing recovery under state compensation Act where the employer failed to obtain federal coverage) is now established under our law. It does not allow double recovery. It does not necessarily deal with the situation where the employer has two separate coverages * * * Dual jurisdiction in twilight zone cases where only one type of coverage exists is well established—a 'theoretical illogic' inevitably caused by an illogical 5 to 4 *Jensen* decision. The result is a fair one—it protects the worker and the one-policy-paying employer (whom the worker can no longer sue at law), at least it provides the one existing remedy, however, it does not necessarily solve the problem when two policies exist and two remedies are open; but if pressing one remedy causes the other to lapse or disappear for any reason, the twilight zone doctrine affords a sensible solution and the only possible relief to the injured workman."

Gilmore and Black, in "The Law of Admiralty," at page 357, state:

> "The Court has not yet articulated its reason for refusing to extend the twilight zone to cover workers whose choice of remedy is between a compensa-

tion proceeding and an action under FELA, the Jones Act or maritime law. Nevertheless, there is a substantial reason for the refusal. Where the choice of remedy is between two compensation acts, the employer's liability is not seriously affected by the rule that allows claims to be brought indifferently on either side: he is liable without fault in either case but only for the administratively determined award. Where, however, the choice is between a compensation proceeding and a court action with right of trial by jury there is a vast difference in what the employer may be ultimately held liable for. Twilight zone theory where the choice is between two compensation acts protects the class of workers without prejudicing their employers. The same theory, where the choice is between compensation and a jury trial, would protect other classes of workers, but at a substantial cost to employers. That far the court has not been willing to go."

In *Chappell v. C. D. Johnson Lumber Corp., supra,* the District Court stated at page 626:

"Even if plaintiff's work was within the penumbra where State and Federal authority overlap, in my opinion the only alternative is coverage under state compensation. The Act was designed to protect injured workmen in hazardous occupations without regard to fault. The rationale and history of the Act as set forth in the *Davis* and *Nogueira* (*Nogueira vs. New York, New Haven & Hartford Ry. Co.*, 281 U.S. 128, 50 S. Ct. 303) decisions require this interpretation of Section 3.

"In this case, state compensation was not available to the plaintiff for the reason that the employer elected not to come under the Oregon Workmen's Compensation Law. Plaintiff therefore seeks to enforce a common-law remedy predicated on his employer's fault. The choice here is not one between state and federal compensation as it was in the *Davis* case. In my opinion, this alternative is not

available to plaintiff for Congress only exempted seamen, at their own request, from automatic coverage, and did not give harbor workers the same privilege. The Act is automatic except in the limited circumstances provided for in the Act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act.

"Since plaintiff was not covered under the Oregon law, it makes no difference whether, at the time of the accident, he was in an exclusively Federal area or within the twilight zone."

The intent of *Davis v. Dept. of Labor & Industries, supra,* was to provide certainty of compensation benefits and not have an employee in a close situation choose one way and then have a court state later that that was the wrong way and the employee be barred from any compensation. That is not the situation here. Petitioner chose initially not to accept the benefits payable under the Longshoremen & Harbor Workers' Compensation Act. Petitioner instead decided to chance litigation in the hope of obtaining a large lump sum payment. When petitioner is unsuccessful in this litigation, he is immediately entitled to receive all the benefits that he could have received at the time of his accident and the current benefits to which he is now entitled. Petitioner has one year from the final determination of this litigation to file a claim for benefits under the Longshoremen & Harbor Workers' Act (Sec. 913(a)(d)).

6. Petitioner's action is based upon the Oregon Employers' Liability Act and this Act cannot be constitutionally applied to a martime tort.

In petitioner's second amended complaint, petitioner alleges that his injuries "were proximately caused by the carelessness, recklessness and negligence of the defendant and the failure of defendant to use every device, care and precaution which it was practicable for defendant to use for the protection and safety of the life and limb of defendant's employees, including plaintiff, without impairing the efficiency of said hopper in the following particulars:" (R. 3).

On the basis of this allegation, as well as perhaps other parts of the record, the Supreme Court of Oregon considered this "a personal injury action under the Oregon Employers' Liability Act * * * " (R. 103). Section 654.305, Oregon Revised Statutes (Pet. Br. 31) states, just as the petitioner stated in his complaint:

> "Generally, all owners, contractors, or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure * * *."

Petitioner asserts that no special statute was needed here and common law negligence would have sufficed (Br. 107), but also he is willing to argue that, even if the Oregon Employers' Liability Act were invoked, it would be a proper invocation (Br. 109).

The Oregon Employers' Liability Act is a unique

statute. Its standard of care is higher than "ordinary negligence." Contributory negligence can only be in mitigation (Oregon Revised Statutes Sec. 654.335; Pet. Br. 34). The defense of fellow servants is abrogated in some instances (Oregon Revised Statutes, Sec. 654.330; Pet. Br. 34).

In light of *Pope & Talbot, Inc. v. Hawn, supra,* and its successors, the Oregon Employers' Liability Act cannot apply in suits brought for maritime tort, such as this.

This was the view of the District Court for the District of Oregon in *Sanderson v. Sause,* 114 Fed. Supp. 849 (1953).

The United States Court of Appeals for the Ninth Circuit in *Henry L. Hess, Jr. v. United States of America,* No. 15685, decided on August 20, 1958, reached a similar conclusion. This case involved a death on the Columbia River and a suit under the Tort Claims Act. The plaintiff in that case was bringing his action under either the death provisions of the Oregon Employers' Liability Act or the Oregon Wrongful Death Statute.

The court at page 9 of its opinion stated:

> "The accident here in question actually occurred on navigable waters. In a suit between private persons, Oregon would have applied the general maritime law as supplemented by state statutes which will not work material prejudice to the characteristic features of the general maritime law."

On page 11, it is stated:

> "What appellant is asking for, however, would upset this balance in two particulars. While gaining,

as in the case of the Wrongful Death Act, an avenue of relief not available in admiralty, he would also (1) benefit from the increase in the standard of care which the Liability Law placed upon appellee, and (2) escape the more effective defenses which he would have to meet with the Wrongful Death Act being applied. In our view, the result would be an unconstitutional displacement of the essential features of general maritime law.

"We, therefore, conclude that the trial court did not err in holding that the Liability Law could not be constitutionally applied in this case."

CONCLUSION

Petitioner was injured on navigable waters of the United States. Before the decision in *Davis v. Dept. of Labor & Industries, supra,* his remedy would clearly have been compensation benefits under the Longshoremen & Harbor Workers' Act. Both Oregon and federal decisions provided decisive precedents that the Oregon Compensation Act would not be applicable. The *Davis* case provided relief for those injured workmen who might be remediless if the shadowy line dividing their remedies had been maintained and whose injuries occurred in such a manner that clear precedents were not available to guide their counsel.

Petitioner is not remediless. Respondent has secured payment of compensation under the Longshoremen & Harbor Workers' Act. Such compensation, retroactively, is payable to petitioner commencing at any time until one year after the termination of this litigation, and has been payable ever since the petitioner was injured.

Petitioner is seeking to expand the "twilight zone" so as to make state compensation laws co-extensive with

the Longshoremen & Harbor Workers' Act. Such an extension would be completely contrary to the decisions of this Court in other personal injury fields wherein the Court has positively announced the doctrine of federal supremacy for maritime torts.

Petitioner is seeking to extend the "twilight zone," not to a choice of workmen's compensation benefits, but to a choice of a damage action or federal compensation benefits. The petitioner has failed to show any need or desirability for such an extension, except a supposed financial advantage to this petitioner in this particular case. In order to be more certain of an advantageous result in this litigation, the petitioner has proceeded under a state law, the Oregon Employers' Liability Act, which is substantially different, not merely supplemental, from the general admiralty and maritime law. This basis of petitioner's action is contrary to lower federal decisions on this very question and contrary to the principles stated by this Court.

Respondent respectfully submits that petitioner has shown no reasons of humanity or law why the decision of the Supreme Court of the State of Oregon should be reversed; on the contrary, the admiralty and maritime decisions of this Court require that the decision be affirmed.

Respectfully submitted,

ROBERT T. MAUTZ,
ARNO H. DENECKE,
10th Floor, Board of Trade Bldg.,
Portland 4, Oregon,
Attorneys for Respondent.

APPENDIX A

ADDITIONAL FEDERAL STATUTES

33 USCA Sec. 404:

"Establishment of harbor lines; conditions to grants for extension of piers, etc.

"Where it is made manifest to the Secretary of the Army that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: Provided, That whenever the Secretary of the Army grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tidewater channels between high and low water mark, to such an extent as to create a basis for as much tidewater as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him."

ADDITIONAL OREGON STATUTES

Workmen's Compensation Act:

ORS 656.154. Injury due to negligence or wrong of a person not in the same employ as injured workman; remedy against such person.

"(1) If the injury to a workman is due to the negligence or wrong of a third person not in the same employ, the injured workman, or if death results from the injury, his widow, children or other dependents, as the case may be, may elect to seek a remedy against such third person. However, no action shall be brought against any such third person if he or his workman causing the injury was, at the time of the injury, on premises over which he had joint supervision and control with the employer of the injured workman and was an employer subject to ORS 656.002 to 656.590.

"(2) As used in this section, 'premises' means the place where the employer, or his workman causing the injury, and the employer of the injured workman, are engaged in the furtherance of a common enterprise or the accomplishment of the same or related purposes in operation."

ORS 656.326. Filing of claim for compensation by workman of joint employers as an assignment to the commission of any causes of action against nonparticipating joint employer and his insurer.

"(1) If a workman is employed jointly by two or more employers, one or more of whom are not subject to ORS 656.002 to 656.590, the filing of a claim by such workman or other beneficiary for compensation under ORS 656.002 to 656.590 constitutes an assignment to the commission of all rights and benefits or causes of action against any of his employers not subject to such statutes or under any insurance policy secured by such employers, for the protection of such workman in the event of injury.

"(2) If a joint employer not subject to ORS 656.002 to 656.590 secured a policy of insurance for the payment of benefits or compensation to a workman, in case of injury in the course of his employment, and such workman elects to take compensation under ORS 656.002 to 656.590, the commission may recover from the insurer that portion

of the insurer's liability which the amount of wages paid by the employer bears to the entire wages of the injured workman.

"(3) If a cause of action against a joint employer is assigned to the commission under this section, the commission may enforce the claim in the manner provided in ORS 656.312 to 656.324 for the enforcement of claims against negligent third parties."

Improvement and Use of Navigable Streams:

ORS 780.010. Stream improvement authorized; channel obstruction prohibited.

"Any person, association, or corporation may enter upon the channel or bed of any and all rivers and watercourses, navigable or susceptible of being made navigable, and perform work and labor thereon, and make such improvement of the same by clearing out or deepening the channel, constructing wing dams, blasting and removing rocks or ledges, removing sand bars, gravel bars, snags and all other obstructions to navigation, so as to render the rivers or any of them navigable at all seasons of the year or to improve the navigation. No work authorized by ORS 780.010 and 780.020 to be done shall be so done or conducted as to obstruct in any manner, either temporarily or otherwise, any channel or river now navigable, but the closing of one or more channels in any river in order to deepen or cause more water to flow in the main channel shall not be construed as constituting an obstruction to the navigation of any river or watercourse."

ORS 780.030. Channels improved are highways free to navigation.

"All channels of rivers and watercourses made navigable or the navigation of which is improved, as contemplated by ORS 780.010, shall be public highways, and shall be free to all steamboats and other crafts navigating them."

APPENDIX B

SECTION I—AGREEMENTS

THE UNDERWRITERS HEREBY AGREE with the Assured herein named, with respect to the coverages specifically indicated by a proper premium charge under Statement 5, subject to the limitations and conditions herein contained, as respects injuries and death as hereinafter defined, suffered or alleged to have been suffered by employees of the Assured during the performance of their duties as such employees, as a result of accidents arising or occurring while this policy is in force, by reason of the operation or prosecution by the Assured of the trade, business or work described herein:

1. Employer's Liability. To pay, within the limits specified in Statement 3, the loss from the liability imposed upon the Assured by law for damages on account of bodily injuries (not including occupational disease) and death resulting therefrom.

2. Workmen's Compensation. To pay voluntarily to any person entitled thereto, within the limits specified in Statement 3, and subject to Conditions 13 to 17, such compensation as would have been payable to such person under the Workmen's Compensation Law of the State of Oregon if the injured employee and the Assured had been operating under said law.

3. Occupational Disease. To pay, within the limits specified in Statement 3, the loss by reason of the liability imposed upon the Assured by law for damages on account of bodily injury and death caused by occupa-

tional disease which arises out of a business operation of the Assured covered by this policy and which results in occupational incapacity necessitating cessation of work during the policy period. With respect to this paragraph, the word "accident" and the word "injuries," wherever used in this policy, shall include occupational disease, as hereinabove defined.

4. Medical. To pay, within the limits specified in Statement 3, for medical, surgical, nurse or hospital services, or in the event of fatal injury, the funeral expenses, including medical or surgical apparatus or appliances and medicines furnished through physicians, surgeons and hospitals designated by the Underwriters, required by the injury defined in Agreements 1, 2 and 3, and for which insurance is provided hereunder.

5. Defense. To give prompt service (a) in investigating cases of bodily injury or death coming within the provisions of this policy, (b) in conducting negotiations for the settlement of any claims made on account of such cases of bodily injury or death, and (c) in defending any suit brought to recover damages on account of such cases of bodily injury or death unless or until the Underwriters may elect to effect a settlement of such claim or suit.

6. Expense. To pay: (a) all expenses incurred by the Underwriters for investigation, negotiation and defense of claims and suits: (b) all premiums on attachment and/or appeal bonds, and all costs taxed against the Assured, in any suit for damages on account of such injuries: (c) all interest accruing on the full amount of any

judgment in such suit, if on account thereof the Underwriters shall be liable for any payment under Agreements 1, 2 and 3, until the Underwriters shall have delivered their check to the judgment creditor or to his attorney of record, in payment of their liability under Agreements 1, 2 and 3, on account of said judgment.

7. Insolvency or Bankruptcy. Bankruptcy or insolvency of the Assured shall not relieve the Underwriters of any of their obligations hereunder. If any person or his legal representatives shall obtain final judgment against the Assured because of any such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within thirty days after it is rendered, then such person or his legal representatives may proceed against the Underwriters to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of his policy applicable thereto.

8. Death of Assured. In the event of the death of the named Assured within the policy period, the insurance provided herein shall cover the legal representative of the named Assured during the unexpired portion of the policy period, provided that notice in writing is given to the Underwriters within thirty days after the date of such death.

9. Exclusions. This policy does not cover (a) the liability of others assumed by the Assured under any agreement, oral or written: (b) any employee while

working in violation of law as to age, or under fourteen years of age if no law restricts the age of employment: (c) any contract convict labor.

SECTION II—CONDITIONS

1. Notices. Any notices, which under the terms hereof, may be required to be given to or by the Underwriters, shall be deemed to be given when given to or by RATHBONE, KING & SEELEY (on behalf of the Underwriters) at Board of Trade Building, Portland, Oregon. The Assured shall forward to the Underwriters' representatives, RATHBONE, KING & SEELEY (a) written notice of every accident as soon as practicable: (b) prompt notice of every claim: (c) every summons and other process in suits as soon as served upon him.

2. Litigation. In the event of litigation under the terms of this Policy, Underwriters agree to accept service in the City of Portland, Oregon, and do hereby specifically designate Calvin N. Souther, Attorney-at-Law, Board of Trade Building, Portland, Oregon, as attorney for the acceptance of such service. It being understood that RATHBONE, KING & SEELEY of Oregon shall have authority at any time for and on behalf of Underwriters to change the designated person for the acceptance of service provided that there will always be one individual designated by RATHBONE, KING & SEELEY on behalf of Underwriters, in Oregon qualified to accept service of suit for and on behalf of subscribing Underwriters at Portland Oregon. It is understood and agreed that, in the event of a suit being instituted by the Assured against any one of the Underwriters hereon

who shall be selected from the whole body of Underwriters on the Lloyds' policy or policies concerned in the loss on which the same cause of litigation arises, and in respect of which a defense common to all Underwriters thereon can be set up, all the Underwriters on this Policy will be bound by the final decision of the courts and settle accordingly.

3. Settlements. The Underwriters shall have the right to settle any claim or suit at their own cost, and the Assured shall not voluntarily assume any liability nor incur any expense other than for immediate surgical relief, nor settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiation for settlement nor in any legal proceedings, but whenever requested by the Underwriters and at the Underwriters' expense, the Assured shall aid in securing information and evidence and the attendance of witnesses, and shall co-operate with the Underwriters (except in a pecuniary way) in all matters which the Underwriters may deem necessary in the defense of any suit or in the prosecution of any appeal.

4. Premium. The premium shall be computed as provided in Statement 6 and if it is greater than the premium paid, the Assured shall pay the additional premium earned; if less, the Underwriters will return the unearned premium when ascertained but shall be entitled to not less than the minimum premium specified in Statement 5, except in the event of cancellation by the Underwriters or by the Assured when actually retiring from business.

5. Cancellation. This Policy may be cancelled at any time by either party by written notice to the other stating when thereafter cancellation shall be effective. Such notice by the Underwriters delivered or mailed to the Assured's address herein given, not less than Ten (10) days prior to effective date of cancellation, shall be sufficient notice. If cancelled by the Underwriters, or by the Assured when actually retiring from business, the earned premium shall be computed as provided in Condition 4. If, however, the final premium so computed is less than the prorata of the specified minmum premium the pro-rata premium of the minimum premium shall be charged. If cancelled by the Assured, when not retiring from business, the remuneration of employees for a full year subsequent to the effective date of this Policy shall be computed (using as a basis the actual remuneration earned to date of cancellation) and the Underwriters shall be entitled to the earned premium thereon, computed according to the usual short-rate table, but not less than said minimum premium. The check of the Underwriters or of their authorized representative delivered or mailed to the Assured's said address, as soon as the amount of unearned premium has been ascertained by the Underwriters, shall be a sufficient tender thereof.

6. Inspection and Audit. Assured shall furnish wage statements to the Underwriters' representative when requested. The Underwriters or their representative shall be permitted to inspect the said place or places of business or work at any reasonable time, and to examine the books and records of the Assured at any time during

the policy period, and within one year after its termination, as respects the remuneration earned by employees during the policy period, and the Assured shall render reasonable assistance. No statement rendered or previous settlement shall bar the said examination or the Underwriters' right to additional premium.

7. Subrogation. The rights of the Assured against other parties as respects any payment under this Policy shall, to the extent of such payment, be subrogated to the Underwriters, and the Assured shall execute all papers required to secure the Underwriters such rights.

8. Commutation. Established claims for compensation, resulting from the injury or death of employees and coming with the scope of this contract, shall be adjusted within two years from the expiration date of this policy on the following basis:

The total sum due said employee or employees from the Assured over the entire period for which such payment or payments are still due shall be calculated, and the said total sum shall then be commuted or discounted as calculated by an actuary or appraiser to be appointed by the Assured and the Underwriters jointly, and the lump sum so commuted may, at the option of the Underwriters, be paid to the Assured by the Underwriters as full and final payment for said Established Claims.

9. Other Insurance. The insurance afforded under this Policy shall be excess insurance over any other valid and collectible insurance carried by the named Assured.

10. Other Work. It is hereby understood and agreed that if, while this Policy is in force, the Assured shall engage in any work or business operations, at the locations specified in Statement 4, other than the work or business operations specifically described in Statement 5, this Policy shall cover such other work or business operations and the Assured shall pay to the Underwriters the premium therefor computed at the Underwriters' premium rate or rates applicable thereto, at the same discount from the rates charged by the Oregon State Industrial Accident Commission as has been given in the rates provided for the classifications as listed in Statement 5.

11. Additional Coverage. If any employee shall sustain injury or death during the course of his employment and if such employee or his legal representative shall file a claim for compensation with the State Industrial Accident Commission of the State of Oregon and shall be found by ruling of such commission or by order of any court on appeal therefrom to be entitled to receive compensation as provided in the Workmen's Compensation Law of the State of Oregon, then this policy shall be interpreted as having been extended to cover the liability of the Assured for such payments, upon condition, however, that the Assured shall pay an additional premium from the inception date of this policy for all employees engaged in the same class or type of operation as the injured or deceased employee which shall be computed at the rate set forth in the last published Schedule of Rates of the State Industrial Accident Commission.

12. The statements in Items 1 to 9 inclusive, in the Statements hereinafter contained, are warranted to be true: Those stated as estimates only are believed to be true. This Policy is issued in reliance upon such statements and in consideration of the provisions of the Policy respecting its premium and the payment of the premium in such Statements expressed.

AGREEMENT TWO IS ALSO SUBJECT TO THE FOLLOWING CONDITIONS:

13. The Underwriters shall not be obligated to pay compensation to any one if the Assured shall operate under the Workmen's Compensation Law of the State of Oregon during any time while this policy is in force.

14. The Underwriters shall not be obligated to pay compensation to the person entitled thereto unless and until such person shall have executed a compensation agreement which shall provide (a) for the payment of compensation as provided in the Workmen's Compensation Law of the State of Oregon: (b) for the designation of a certain doctor who shall determine the time of termination of total disability and the extent of permanent partial disability, if any: (c) for the arbitration by two duly licensed physicians and surgeons, one to be selected by the employee and the other by the Assured, and a third to be selected by the first two in the event they cannot agree, of any dispute relative to the termination of total disability and the extent of permanent partial disability: (d) for the payment by the Assured and the employee of the expense of their own arbitrators and the division of the expense of the third

arbitrator between them: and (e) for the release of all claims against the Assured and the Underwriters for such injuries and or death excepting only the obligation to make the payments provided in said compensation agreement.

15. The Underwriters shall not be obligated to pay compensation to the person entitled thereto if the injured employee or his legal representative shall have instituted or prosecuted any suit or action against the Assured to recover damages for the injuries or death for which compensation is sought to be recovered under this policy.

16. The Underwriters shall not be obligated to pay compensation to the person entitled thereto if the Assured and the Underwriters shall agree that such compensation should not be paid, and the Underwriters may withdraw any offer to pay compensation, without notice, at any time before acceptance of the offer by the person entitled thereto.

17. In the event that the injury or death of any employee for which compensation is payable hereunder is, in the opinion of the Underwriters, due to the negligence of some person or persons other than the Assured then such employee, his heirs or personal representatives, shall prosecute an action for damages against such person or persons at the expense and under the direction and control of the Underwriters and any recovery therein shall first be applied to the extinguishment of the obligation hereby assumed.

SECTION III—STATEMENTS

1. Name of Assured .....
   Address .....
   (Street, Town and State, where office is located)
   Individual, Co-partnership, Corporation or estate?
   .....

2. The Policy Period shall be from ..... 19 ..... to ..... 19 ..... at 12:01 A.M., Standard Time at Assured's address as to each of said dates.

3. The Underwriters' liability under this Policy—

   (A) As regards bodily injuries (fatal or non-fatal) from accident shall be limited to FIFTY THOUSAND DOLLARS ($50,000.00) for all claims arising out of injuries to or the death of one person from any one accident, and subject to that limit for each person, the Underwriters' total liability for all claims arising out of injuries to or the death to that for each person, the Underwriters' total liability for all claims arising out of injuries to or the death of more than one person from any one accident is limited to ONE HUNDRED THOUSAND DOLLARS ($100,000.00);

   (B) As regards bodily injuries (fatal or non-fatal) from occupational disease shall be limited to FIFTY THOUSAND DOLLARS ($50,000.00) for all claims arising out of the injury or death of one person, and subject to the same limit for each person, the Underwriters' total liability for

all claims arising out of injuries or deaths from occupational disease shall be limited to ONE HUNDRED THOUSAND DOLLARS ($100,000.00) for the entire policy period.

4. The locations, by State, Town or City, Street and Number, of all Factories, shops, yards, buildings, premises or other work places to which this Policy shall apply are as follows: .....

.....

In addition to the foregoing locations, this Policy shall also apply to such injuries so sustained elsewhere by employees engaged in the said trade, business or work, and not hereinafter excluded, when such employees are sent temporarily from the said locations to perform elsewhere their duties in connection with the operation or prosecution by the Assured of the trade, business or work insured hereunder.

5. The insurance afforded is only with respect to such and so many of the coverages as are indicated by a specific minimum permium charge.

Minimum Premium: $ .....

CLASSIFICATIONS	ESTIMATED PAY ROLL	RATE COMPENSATION	RATE O. C.	PREMIUM

6. The premium shall be computed, at the rates or rates specified in Statement 5, upon the entire remuneration of whatsoever kind earned during the Policy period by all employees engaged in or in connection with the business operations or work described in Statement 5, including drivers, drivers' helpers, chauffeur's helpers, loaders, material han-

dlers, pay clerks, timekeepers, salesmen, collectors, messengers, and clerical office force. If the Assured is a corporation the entire remuneration of the President, Vice-President, Secretary, Treasurer, and any other executive officers elected or appointed in accordance with the charter or by-laws of the corporation (subject to a maximum individual pay roll of $1,200 per annum for each such officer) shall be included in said computation at the premium rates applicable to their respective duties, provided that the entire pay roll so developed of each such executive officer who performs such duties as are ordinarily undertaken by a superintendent, foreman or workman, or who is directly responsible for the actual performance of any operation or operations of the risk, shall be assigned without division to the highest rated classification which describes any duties undertaken by such executive officer or any operation for the actual performance of which such executive officer is directly responsible. The entire pay roll so developed of all other executive officers shall be assigned without division to the classification which describes the actual operations in which such executive officers are primarily engaged. There shall be no exclusions from the said premium computation except as provided in Statement 7.

7. The following employees are specifically excluded from the Policy and from the premium computation

8. No explosives are or will be used in connect

with the work insured hereby, except as follows:

.....

9. No Insurer has cancelled or refused to issue or renew Employer's Liability, Elevator or Boiler insurance for this Assured during the past three years, except as follows: .....

.....

Attached to the forming part of Policy No. .....
Dated at Portland, Oregon, this ..... day of
..... 19 .....

RATHBONE, KING & SEELEY.
By .....

APPENDIX C

Appellate decisions subsequent to *Davis v. Department of Labor and Industries* holding the Longshoremen and Harbor Workers' Act applicable despite contention that state compensation law applicable:

Cleaning tank on barge out of water on marine railway.

Avondale Marine Ways v. Henderson, 346 US 366, 74 Sup. Ct. 100 (1953).

Repairing gate of drydock; prior state compensation award.

Newport News Shipbuilding & Drydock Co. v. O'Hearne, 192 F.2d 968 (CA 4th, 1951).

Repairing tugboat on marine railway; prior state compensation award.

Western Boat Building Co. v. O'Leary, 198 F.2d 409 (CA 9th, 1952).

One of "shore gang" who went on barge to shout to tug.

De Bardeleben Coal Corp. v. Henderson, 142 F.2d 481 (CA 5th, 1944).

Constructing new drydock and water pumped out of river.

Travelers Ins. Co. v. McManigal, 139 F.2d 949 (CA 7th, 1944).

One of "shore gang" for dredge engaged in deepening channel; killed while leaving work via pontoon line.

Standard Dredging Corp. v. Henderson, 150 F.2d 78 (CA 5th, 1945).

Injured employee watchman-carpenter for laid up vessel—injured climbing on ladder from pontoon to ship.

Hillcone S. S. Co. v. Steffen, 136 F.2d 965 (CA 9th, 1943).

Welder making repairs on ocean-going tanker in drydock.

Flowers v. The Travelers Insurance Company, (CA 5th, July 15, 1958, No. 16654).